SUBJECT INDEX

LIST OF AUTHORITIES

CONSTITUTION OF THE STATE OF TEXAS

REVISED CIVIL STATUTES OF TEXAS (1925)

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

KIRBY LUMBER CORPORATION, *Petitioner*,

v.

DENMAN KOUNTZE, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved

On July 5, 1902, Texas Land and Cattle Company conveyed to John Henry Kirby lands in East Texas, by deed containing reservations and covenants respecting oil (R. 45-54). Respondents, Denman Kountze and J. T. Stewart III, successors to the rights of grantor in said deed, brought suit for declaratory judgment against petitioner, successor in interest to the grantee.[1]

---

[1] R. 2-14—Proceeding was under 28 U.S.C.A., Section 400; Judicial Code, Section 274d. There is diversity of citizenship; value in controversy exceeding $3000.00.

The substantive issues were thus made by stipulation *(Respondents* substituted for *Plaintiffs* and *Petitioner* for *Defendant)*:

> "Petitioner admits that Respondents have power to execute an oil lease covering the full estate in the oil in place. The issue to be litigated in this case is the question of whether Petitioner is entitled, upon execution of such a lease by Respondents, to—
>
> "(1) Only 1/20th or 5% of all royalty provided in any such lease, as contended by Respondents, or
>
> "(2) A royalty of 1/20th or 5% of all oil produced, as contended by Petitioner; or
>
> "(3) Both a royalty of 1/20th or 5% of all oil produced, to be paid to it by the lessee, and 1/20th or 5% of all royalties paid by the lessee to Respondents."

The trial court held that the deed was not ambiguous, and that under governing Texas law of minerals and conveyancing, Petitioner was entitled as under the third alternative of the stipulation (R. 117-18). The Circuit Court of Appeals also held that the deed was unambiguous, but that under the Texas laws of minerals and conveyancing Petitioner is entitled as under the first alternative of the stipulation alone (R. 130-39).

Basis of Supreme Court's Jurisdiction

The Supreme Court has jurisdiction to grant writ of certiorari in this cause under the provisions of Section 240 of the JUDICIAL CODE as amended; Title 28, Section 347, U.S. C.A.

There are at issue in this cause generally important questions arising under the mineral laws of the State of Texas and the law of interpretation of mineral conveyances and conveyances in general, which supply the answers to the ulti-

mate legal questions set forth in the above quoted stipulation and below. The Court below misconceived and misapplied the Texas law; and we submit that the result would have been different in the State Court, had the cause been litigated there.

The judgment of the Circuit Court of Appeals was rendered and entered (R. 140, 153 Fed. (2d) 695) and opinion filed (R. 130) on February 18, 1946. This petition is being printed and mailed to reach the Clerk of this Honorable Court prior to the expiration of three months from February 18, 1946.

Questions Presented

The issues are whether the Circuit Court of Appeals, under the laws of Texas governing mineral estates, conveyancing and the interpretation of deeds, erred in the following particulars:

1. In holding that, upon Respondents' executing an oil lease upon the full estate in the oil in place on the lands in question, petitioner is entitled to only 1/20th of the proceeds including royalty provided in such lease.

2. In holding that, upon the execution by Respondents of a lease covering the full estate in the oil in place on the lands in question, Petitioner is not entitled to a royalty of 1/20th or 5% of the oil produced, to be paid to Petitioner by the lessee.

3. In refusing to hold that Petitioner is entitled, upon the execution by Respondents of a lease covering the full estate in the oil in place, both to a royalty of 1/20th or 5% of the oil produced, to be paid to petitioner by the Lessee, and 1/20th or 5% of all proceeds of the lease transaction including royalties which are paid by the lessee to Respondents.

Reasons for Allowance of the Writ

There is involved in the interpretation of the deed in question the Texas municipal law of mineral estates, and of interpretation of instruments both generally and as they create mineral estates. In its opinion the Court below has confused and misapplied principles of Texas law in such manner as to cause a difference in result from what would have been the result had this cause been tried in Texas courts, and to lay the basis for widespread and harmful differences generally in law, and its application, as between the State and Federal jurisdictions, in fields of law upon which vital parts of economy of Texas depend, and in which such confusion and disparity flowing from the "accident of Federal jurisdiction" should not be tolerated. THOMPSON TRUSTEE v. MAGNOLIA PETROLEUM COMPANY, ET AL., 309 U.S. 478, 484; also ERIE RAILROAD COMPANY v. TOMPKINS, 304 U.S. 64; RULES OF THE SUPREME COURT No. 38, Par. 5 (b); RUHLIN v. NEW YORK LIFE INSURANCE COMPANY, 304 U.S. 202, 206 and 208-9; ALICE STATE BANK v. HOUSTON PASTURE COMPANY, 247 U.S. 240, 241; CITIES SERVICE OIL CO. v. DUNLAP, 308 U.S. 208; RORICK v. DEVON SYNDICATE, 307 U.S. 299.

The conceptual basis of Texas law of oil and gas is, almost uniquely, that such substances are owned in place. There may be other interests in the oil which do not amount to ownership of the oil or any part thereof *in place*, such as royalty interests, overriding royalty interests, oil payments. The existence of such is not inconsistent with the ownership of *all the oil in place* by persons other than the owners of such rights. Such rights partake of the nature of rent estates at common law, are incorporeal, and are not ownership of oil or gas in place. They are rights to receive a portion of oil or gas after production and as personalty, or money measured

by production of a portion of the oil so long as it is produced, or money of a designated gross amount to be received as measured by production of a portion of the oil if and as produced until the designated sum is paid. All such are regarded as interests in minerals considered as real estate, taxable and conveyable as real property; but they are incorporeal and are not ownership of minerals in place. Their ownership is not at variance with, but consistent with and often and indeed typically present with ownership of all the minerals in place by others.

The Circuit Court of Appeals has failed to comprehend and apply these fundamentals and distinctions. To it there is no distinction between incorporeal royalty interest and ownership of oil in place; consequently, the key to the proper construction of the deed is lost. It is held that these can not operate together:

> (1) A royalty provision which, unconnected with ownership of any of the oil in place, would give to petitioner a right to 5% of gross production *from the lessee—producer*, regardless of ownership of all the oil in place, and
>
> (2) A provision for ownership by petitioner of 5% of the *oil in place*, with a *right to receive from Respondent*, on lease, 5% of the proceeds of the sale of all the *oil in place*,

which features are perfectly reconcilable under Texas laws, and coexist by the terms of the deed.

The confusion and destructive result in the Court below are patent from the larger aspects of the opinion. The *first basic premise* is apparently that an oil lease executed by Respondents, reserving royalty, is a conveyance of all the minerals in place, notwithstanding the reservation of royalty. So much is in accord with law. But the Court is either unaware

of its own first premise or does not realize its implication; for the *second basic and determinative premise* is that if, after lease, petitioner is entitled to a 1/20th royalty, the lessee can not have acquired all of the oil in place (R. 137). These two foundations of the result below cannot co-exist. Bringing either into harmony with the other would change the result, and entitle Petitioner to 5% royalty on any lease.

On the basis of its misconceptions of the basic mineral law, and forced and unrealistic "conflicts," the Circuit Court of Appeals misapplies the laws of construction which govern the interpretation of this deed. It leaves without practical operation provisions designed to protect Petitioner and its predecessors in a 5% royalty interest as an incorporeal right disconnected from ownership of oil in place, to be received from the owner of any and all wells drilled on the lands. It does not give effect to all parts of the instrument, does not give effect to manifest intention, and does not indulge the interpretation most strongly favoring the grantee, all established canons of construction under the Texas decisions. CARTWRIGHT v. TRUEBLOOD, 90 Tex. 535, 39 S.W. 930.

This Court knows that Texas leads in oil production. The foundations of its mineral law were carefully laid. The conceptual bases were formulated to promote and make stably marketable every character of interest. A decision, such as that of the Circuit Court of Appeals, erasing and destroying within the Federal jurisdiction carefully created basic conceptions which govern in the State Courts, can well lay the predicate for destruction of much that has been accomplished by carefully evolved decisions of the Supreme Court of Texas. Such disparities between State and Federal decisions are particularly against the public interest when they involve, as do those in the present instance, the principles ordering the most important part of a State's economy.

Conclusion

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued as provided by law to the United States Circuit Court of Appeals for the Fifth Circuit, that the case be reviewed and determined by this Court, that your Petitioner may have such relief in the premises as to this Court may seem just, and that the judgment of said Circuit Court of Appeals be reversed by this Honorable Court.

DATED at Houston, Texas, May 9, 1946.

KIRBY LUMBER CORPORATION,
Petitioner,

By Joyce Cox

JOYCE COX,
2828 Gulf Building,
Houston 2, Texas

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

KIRBY LUMBER CORPORATION, *Petitioner*,

v.

DENMAN KOUNTZE, ET AL., *Respondents*

PETITIONER'S SUPPORTING BRIEF ON PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The opinion of the Circuit Court of Appeals (R. 136-139) is reported in 153 Fed. (2d) 695. Jurisdiction of this Court is invoked under JUDICIAL CODE, Section 240 as amended, 28 U. S. C. A., Section 347, upon the theory that the Court below decided an important question of local law in a way probably in conflict with applicable local decisions. Rule 38, 5(b) of the Supreme Court. We contend the Court below has misapplied the all-important basic mineral and conveying laws of Texas, with a result different from what would have been the result in the State Courts, and created a harmful precedent in a field of law vitally

important to the greatest oil producing State, besides working great injury to Petitioner.

The Texas Land & Cattle Company on July 5, 1902, conveyed a large quantity of land in Tyler and San Augustine Counties, Texas, to John Henry Kirby (R. 45-54). Petitioner is successor to Kirby's rights, Respondents are successors to the grantor's rights. The lands are conveyed with certain reservations and exceptions, and with certain covenants, which are the genesis of the present dispute. They are quoted in the margin.[1]

---

[1] 1. "Excepting And Reserving, however, from this conveyance, unto the said grantor, its successors and assigns forever, ninety-five per cent (95%) of any and all oil upon, within or under the aforesaid lands hereby conveyed and every part thereof, with the full and complete rights and powers following, to-wit:

2. "To, at any and all times, enter upon said lands and every part thereof, and thereon, therein and thereunder to search for, sink, drive, dig and bore for, mine, work, and get all of the oil found upon, within or under said lands and every part thereof, and to ship, transport, take away and dispose of ninety-five per cent. (95%) of all the oil, so obtained.

3. "To, at any and all times, on said land, manufacture, handle, refine and treat aforesaid ninety-five per cent (95%) of said oil, and to ship, transport, take away and dispose of any and all products, materials and things so obtained:

4. "To, at any and all times, lay down, construct, maintain, use and operate in, upon and over said lands or any part thereof, pipes, pipe-lines, roads, tramroads and all other appliances and means of transportation necessary and proper for the transportation of said oil and other products obtained by the manufacturing, handling, refining and treating the same and for the transportation of the tools, machinery and supplies of every nature necessary and proper in obtaining said oil from the ground, manufacturing, handling, treating or refining the same, and in storing, caring for and handling said oil or any product obtained therefrom.

5. "In the convenient and proper accomplishment of the purposes and things aforesaid to, at any and all times, erect, set up, use, maintain and operate on said land or any part thereof steam and other engines, machinery, works, tanks, furnaces, buildings, houses and other structures, and at pleasure to remove and carry away the same; to, at any time and all times, use any part of the

The case originated in the Eastern District of Texas as a proceeding for declaratory judgment under JUDICIAL CODE, Section 274(d), with jurisdiction based on diversity of citizenship and value exceeding $3000.00 in controversy (Tr. pp. 2-3, Par. II, Petition; allegations admitted, R. 14, Par. II; R. 130 FN). The issues were narrowed by stipulation as follows: (Substituting *Petitioner* for *Defendant*, and *Respondents* for *Plaintiffs*):

"Petitioner admits that Respondents has power to execute an oil lease covering the full estate in the oil

---

surface of the land for storing or placing thereon said oil and products derived from manufacturing, handling, refining and treating the same and the rubbish and other materials incident to such operations; to take and use, free of charge, for any of the purposes aforesaid, all water on said lands, loose stone and rock lying on the surface; to take and use for any of the purposes aforesaid, upon paying the fair value thereof, all the timber on said lands or any part thereof under fifteen inches in diameter; to have free ingress, egress and regress at all times in and upon said lands and every part thereof for the purposes aforesaid; to do all such other acts and things not expressly named herein as may be necessary and convenient to obtain the full benefit of the property, rights and powers by this instrument excepted and reserved.

6. "There is also hereby Expressly Reserved to and conferred upon said grantor, its successors and assigns, the full and absolute right and power in good faith to sell and convey the whole of the oil under, within and upon said lands hereby conveyed or any part thereof, and any conveyance or conveyances so made shall pass to the grantee or grantees therein the whole of the oil upon, within and under the particular land designated and described in said conveyance or conveyances; but in such event said vendor or vendors shall pay or deliver to said John H. Kirby, his heirs, executors, administrators or assigns, then owning the interest in said oil not herein and hereby reserved one-twentieth of the purchase price obtained upon said sale.

7. "In the event of any such sale or sales, the purchaser or purchasers, his or their heirs, executors, administrators and assigns, shall have all and the same rights and powers as to said five per cent. (5%) of said oil as are by this instrument reserved and conferred as to said ninety-five per cent. (95%).

in place. The issue to be litigated in this case is the question of whether Petitioner is entitled, upon execution of such a lease by Respondents, to—

"(1) Only 1/20th or 5% of all royalty provided in any such lease, as contended by Respondents, or

"(2) A royalty of 1/20th or 5% of all oil produced, as contended by Petitioner; or

"(3) Both a royalty of 1/20th or 5% of all oil produced, to be paid to it by the lessee. and 1/20th or 5% of all royalties paid by the lessee to Respondents" (R. 44).

The case was tried before Judge Randolph Bryant who on June 16, 1945, entered judgment as follows:

"And the Court finds, and accordingly Orders, Ad-

8. "The aforesaid rights and powers hereby reserved and conferred may be exercised not only by the said grantor, its successors and assigns, but by its or their lessees, agents and workmen and any and all other persons by its or their authority or permission; and neither the said grantor nor any of the aforesaid persons deriving their powers mediately or immediately from or through it shall be liable or responsible for any damage or injury whatever which shall or may be caused to said lands or anything thereon by the doing of any of the acts or things the right to do or perform which is hereby reserved and conferred.

9. "It is distinctly understood and agreed that said grantor, its successors and assigns, shall deliver to the said John H. Kirby, his heirs, executors, administrators and assigns, at any well bored or sunk in said lands the one-twentieth part of all crude oil produced and saved from said well. If there is a pipe-line connected with said well, the said one-twentieth shall be delivered in said pipe-line to the credit of the party entitled thereto; if there is no pipe-line connected with said well, then said party entitled to said one-twentieth shall, at his own proper cost and charge, provide the means of saving, receiving and storing his said one-twentieth. This obligation to deliver one-twentieth of said oil shall be one running with the ownership of the well, and when said grantor or any person or persons succeeding to its interest disposes of any interest in any well there shall no longer rest upon it or them any obligation to perform this covenant, but such obligation shall thereupon attach to the person or persons succeeding to such interest."

judges and Decrees, that the terms of said deed are not ambiguous with respect to the issues before the Court for determination; that Plaintiffs as they are successors in interest to the grantor in said deed have the right to execute leases covering the full estate in the oil in place under all or any part of said lands or under any part of said lands; that Defendant is entitled to a royalty of 1/20th, or five (5%) per cent, of all oil produced from said lands or any part thereof; and that Defendant is additionally entitled to 1/20th, or five (5%) per cent of all bonus, delay rentals and royalties received by Plaintiffs as a result of the execution of any oil lease upon said lands or any part or parts thereof" (R. 120).

To the same effect are his findings of fact and conclusions of law (R. 109-118).

The Circuit Court of Appeals reversed Judge Bryant's judgment on February 18, 1946, holding that under the terms of the deed, Petitioner is entitled, upon lease by Respondents of the oil under said lands, only to 5% of the proceeds received by Respondents from said lease, and is not entitled to the 5% royalty as provided for in Paragraph 9 of the deed (Tr. 130-139; Judgment, R. 140).

Points of Error

We contend that the Circuit Court of Appeals erred, under the governing laws, in holding:

1. That upon Respondents executing an oil lease covering the full estate in the oil in place on the lands in question, Petitioner is entitled only to 1/20th or 5% of all royalty provided in any such lease.

2. That upon the execution by Respondents of

a lease covering the full estate in the oil in place on the lands in question, Petitioner is not entitled to a royalty of 1/20th or 5% of oil produced, to be paid to Petitioner by the Lessee.

3. That Petitioner is not entitled, upon the execution by Respondents of a lease covering the full estate in the oil in place, both to a royalty of 1/20th or 5% of all oil produced, to be paid to Petitioner by the Lessee, and 1/20th or 5% of all royalties paid by the Lessee to Respondents.

Argument

1. *Basic Principles of Texas Law Confused and Not Applied by the Circuit Court of Appeals*

An eminent authority says " * * * that the legal interest of a Texas landowner in the oil and gas under his land purports to be determined on the basis of their physical similarities to a block of granite, while the interest of a Louisiana landowner in the oil and gas under his land, just across the State line, purports to be determined on the basis of their physical likenesses to wild game." (18 TEX. LAW REVIEW, p. 28.)[2]

Supporting and illustrating cases are: TEXAS CO. v. DAUGHERTY, 107 Tex. 226, 176 S.W. 717 (1915); PRAIRIE OIL & GAS CO. v. STATE, 231 S.W. 1088 (Tex. Com. App. 1921); STEPHENS COUNTY v. MID-KANSAS OIL & GAS CO., 113 Tex. 160, 254 S.W. 290 (1923); HAGER v. STAKES, 116 Tex. 453, 294 S.W. 835 (1927); BROWN v. HUMBLE OIL & REFINING CO., 126 Tex. 296, 83 S.W. (2d) 935 (1935), on rehearing, 87 S.W. (2d) 1069 (1935); RAILROAD COMMISSION OF TEXAS v. MAGNOLIA PETROLEUM CO., 130 Tex. 484, 109 S.W. (2d) 967 (1937); TEXOMA NATURAL GAS

[2] W. L. Summers, **Legal Rights Against Drainage**, 18 Texas Law Review, 27, 28.

Co. v. TERRELL, 2 F. Supp. 168 (W. D. Tex. 1932); CANADIAN RIVER GAS CO. v. TERRELL, 4 F. Supp. 222 (W. D. Tex. 1933). See also THOMPSON v. CONSOLIDATED GAS CO., 300 U.S. 55, 68.

Royalties and other rights, either to a part of the oil as personalty after production or to money measured in production, are under the Texas Law regarded as proceeds from the sale of minerals in place, and insofar as their character as real estate or personalty is concerned, are regarded as real property but incorporeal hereditaments and not ownership of oil in place. The authorities carefully distinguish such rights from ownership of the oil in place; and the ownership of such rights by one person or set of persons is entirely consistent with, indeed most commonly associated with, the ownership of all the minerals in place by others. The rules are the same, whether the owner of the incorporeal interest is entitled to a part of the oil after production and as personalty, or money measured by production. See MCLEAN v. STATE, 181 S.W. (2d) 725, writ of error refused; LOCKHART v. WILLIAMS, 192 S.W. (2d) 146 (Sup. Ct. not yet officially reported).

In ATTORNEY GENERAL v. HATCHER, 115 Tex. 332, 281 S.W. 192 (1926), it was held that royalties on leases of University lands were "proceeds" from the sale of the minerals in these lands and were not income. In STEPHENS v. STEPHENS, 292 S.W. 290, writ dismissed, it was held that royalties derived from a lease of separate property of the husband were proceeds from the sale of the land and therefore separate property of the husband. In TEXAS COMPANY v. DAUGHERTY, 107 Tex. 226, 176 S.W. 717, the lease was a conveyance upon limitation with royalty. The grant was said to be of "all the oil, gas, coal and other minerals," that is a grant of all the minerals in place.

The following from STEPHENS COUNTY, ET AL., v. MID-

KANSAS OIL & GAS COMPANY, 113 Tex. 160, 254 S.W. 290, may be helpful:

(P. 292) "Ownership of the gas and oil in place meant having the exclusive right to possess, use and dispose of the gas and oil. The grantors were clearly divested of the right to either possess, use or dispose of the gas and oil *in place* in the lands described in the instruments here involved as soon as the instruments were executed. At the same instant, the right to possess, use and dispose of such gas and oil *in place* passed to the grantees in said instruments and to their assigns. Complete divestiture of title to the gas and oil could hardly be more clearly evinced than by the necessity for an express grant or reservation of even enough gas for domestic use in the grantors' dwellings. Dominion over a thing could not well be completer than it is in those persons who may, at their will, assign it to any other person, with or without consideration, for a time which may be forever. Sims v. Sealy, 53 Texas Civ. App. 518, 116 S.W. 630. The fact that whoever owns the gas and oil, under these instruments, is subject to certain obligations to the former owners, express and implied, with regard to exploration for, and production of, the gas and oil, and with regard to the payment of royalties, in no wise reinvests the former owners with title. Nor does the possibility of future reversions accomplish present reinvestitures of title in the former owners." (Emphasis ours.)

* * *

(P. 294) "Notwithstanding the distinctions attempted to be drawn in the decisions, we cannot conclude otherwise than that there is no real difference in the title conveyed whether an instrument takes the form of a grant of the exclusive right to mine and appropriate all of a certain mineral—as in Benevides v. Hunt, supra,—or takes the form of a demise of the land, for the sole purpose of mining operations, coupled with a grant of the ex-

clusive right to produce and dispose of the mineral—as in this case—or takes the form of a grant of the mineral with the exclusive right to mine for, produce, and dispose thereof—as in Texas Company v. Daugherty, supra. The results are substantially the same to all parties at interest, whether the one or other form of instrument be used. Why hold that instruments in different forms create different estates, where there is no difference in fact with respect to that of which each divests the grantor, his heirs or assigns, nor with respect to that with which each invests the grantee, his heirs or assigns?"

* * *

(P. 295) "The instruments mentioned in the certificate of the Court of Civil Appeals have passed to appellee determinable fees in the lands; leaving in the grantors, their heirs or assigns, the possibility of reacquiring the absolute fee simple titles, less whatever minerals may be meantime produced and marketed."

In the HATCHER case, 2 LEAKE'S LAW OF PROPERTY IN LAND, page 55, is quoted with approval as follows:

"'A lease of minerals or a license to take minerals for a term of years is equivalent to a sale out and out of so much of the soil itself as consists of the minerals to be taken, and the rent reserved upon a mineral lease is not like the ordinary rent or reservation of annual profits, but in effect a payment in installments of the price of the minerals sold. It is usual to reserve it in the form of a royalty, that is a proportion of the minerals worked or of their value.'"

In EHLINGER v. CLARK, 117 Tex. 547, 8 S.W. (2d) 666, opinion by CHIEF JUSTICE CURETON, it was held that a lease for cash and deferred cash consideration, and royalty, is a sale of the minerals in place (8 S.W. (2d) at 670), a sale of "the whole of its mineral estate in the land" (670), "the consideration" was the cash and right to receive oil as per-

sonalty after production (670). The lands (minerals) were "sold on a royalty basis" (672). The Court felt that $4,000.00 and the royalty promised was "a fair price for the whole of the oil in place in the bowels of the earth" (672). The contract is the "usual one—by those who sell mineral rights."

In THEISEN v. ROBISON, 117 Tex. 489, 8 S.W. (2d) 646, at 650, the Court says "at the date of the adoption of the Constitution and for prior centuries minerals were usually converted into money by sales working a severance of the mineral estate, consummated by means of writings commonly called leases." The Constitution in question was adopted in 1876, before oil development in Texas. It was held in this case that the lease on royalty and cash consideration was sale of all the minerals.

Section 4 of Article 7 of the CONSTITUTION reads in part as follows:

> "The lands herein set apart to the Public Free School Fund shall be sold under such regulations, at such times, and on such terms as may be prescribed by law."

The so-called "Relinquishment Act" Articles 5367 through 5382, R. C. S. 1925, enacted in 1919, was sustained by the Supreme Court as Constitutional under the foregoing provision in GREENE v. ROBISON, 117 Tex. 516, 8 S.W. (2d) 655.

Section 2 of the aforesaid Act (Article 5368, R. C. S. 1925) conferred the following powers upon the owner of the surface with respect to minerals reserved to the State:

> "The owner of said land is hereby authorized to sell or lease to any person, firm or corporation the oil and gas that may be thereon or therein upon such terms and conditions as such owner may deem best, subject only to the provisions hereof, and he may have a second lien

thereon to secure the payment of any sum due him. All leases and sales so made shall be assignable. No oil or gas rights shall be sold or leased hereunder for less than ten cents per acre per year plus royalty, and the lessee or purchaser shall in every case pay the State ten cents per acre per year of sales and rentals; and in case of production shall pay the State the undivided one-sixteenth of the value of the oil and gas reserved herein, and like amounts to the owner of the soil."

It will be noted that this Act provided that the owner of the land might "sell or lease" the oil and gas. And "all leases and sales" so made shall be assignable. It has been held that in view of the terms of the Act, the owner of the land may *only* execute leases. STATE v. MAGNOLIA PETROLEUM COMPANY, 173 S.W. (2d) 186, writ refused.

In AVIS, ET AL., v. FIRST NATIONAL BANK OF WICHITA FALLS, 141 Tex. 489, 174 S.W. (2d) 255, the Court say of the power vested by will in a trustee to sell, as applied to the execution of an oil and gas lease with covenants of royalty:

(P. 258.) "Whatever confusion may have existed years ago about the nature of an oil and gas lease, caused by early opinions of this Court, same was clarified by its later opinions. This Court has definitely declared that an oil and gas lease is the same as the sale of real estate."
* * *
(P. 259.) "By the terms of the will the trustee was authorized to execute an oil gas lease on the land conveyed in trust by the will."

In SHEPPARD v. STANOLIND OIL & GAS COMPANY, 125 S.W. (2d) 643, writ refused, the Court say:

(P. 647.) "In this state leases of this character are held to be conveyances of the mineral title in fee upon limitation. Consequently everything paid or contracted,

whether in money or in oil or its proceeds, as distinguished from delay rentals, constitutes a part of the purchase price for the lease. In this particular the 'oil bonus' (the term usually applied to the sums under consideration) stands upon the same footing as the cash bonus. But here the analogy between the oil bonus and money bonus (whether cash or deferred) ends. Royalty also is on the same footing as bonus, cash, deferred, or oil, as regards representing a part of the purchase price for the lease. And this is true for another reason: Oil in place is a part of the land. It constitutes real estate. When it is severed from the soil, the land itself is taken (wasted) to that extent, and the corpus of the estate in the land is to that extent depleted. Consequently anything which the lessor receives, in whatever form, in consideration for the oil taken or to be taken from the land, constitutes a part of the purchase price of the title to the oil, and therefore of the land. State v. Hatcher, 115 Tex. 332, 281 S.W. 192; Andrews v. Brown, Tex. Civ. App., 283 S.W. 288. * * * "

See also STATE NATIONAL BANK v. MORGAN, 135 Tex. 509, 143 S.W. (2d) 757, 760; ANDREWS v. BROWN, 283 S.W. 288, 292-3; SUMMERS OIL AND GAS (Per. Ed.), p. 347, Par. 571, Id., p. 391, Par. 586.

The canons of construction which come into play and which we contend the Court below violated and misused are sufficiently stated in CARTWRIGHT v. TRUEBLOOD, 90 Tex. 535, 39 S.W. 930 as follows:

"Before examining the language of the deed, we will state some of the rules which must govern in the construction of it, and in arriving at the intention of the parties. Every part of the deed must be given effect if it can be done, and, when all of the parts are harmonized, the largest estate that its terms will permit of will be conferred upon the grantee. (Hancock v. Butler, 21

Tex. 816.) If the language cannot be harmonized, from which an ambiguity arises in the deed, so that it is susceptible of two constructions, that interpretation will be adopted which is most favorable to the grantee."

2. *Analysis of the Circuit Court of Appeals' Opinion*

We have already commented, in the petition, on the basic contradiction in premises in the Circuit Court of Appeals' opinion. Briefly the Court acts upon the premise that a lease with a royalty reservation is a conveyance to the lessee of all the minerals in place, and holds, contradictorily, that the existence in petitioner of a royalty interest after lease would prevent the lease from vesting all the minerals in place in the lessee. In this contradiction exists the highlight of the Court's failure to comprehend and apply the Texas law. This failure is further exemplified in the detail of the opinion.

In describing the deed's sixth paragraph, the Court says that the grantor reserves power "to sell and convey the whole of the oil" (Tr. 132). Significantly there is no comment on or mention of the qualifying words which limit this power to conveyance of the oil in place. The oil that may be conveyed is "the whole of the oil *under, within and upon said land* * * *," *that is the oil in place,* and not Petitioner's royalty interest under Paragraph 9 of the deed, existing as an incorporeal right with respect to, but not ownership of, oil in place.

The same misapprehension and inconsistency appear in the Court's finding that petitioner's construction causes a conflict in the deed because a Paragraph 6 purchaser by lease would obtain the whole of the oil, whereas under Paragraph 9 petitioner would have 5% of the oil (R. 136). Here is error of minds thinking solely in terms of the law of capture. Oil is oil; and there is no distinction between its owner-

ship in place and royalty interest, a distinction basic in Texas (R. 136).

The same misconceptions and confusion follow in the Court's treatment of Paragraph 9, first in the statement that Paragraph 9 applies only so long as Respondents do not sell any of the oil, or sell only 95% of it (R. 137). Here again, to the Court, 5% of the oil in place is 5% of the oil produced—a confusion of the nature of fee and royalty. The Court says (full paragraph, R. 137) that the vendee of all the oil is not a successor or assign of Respondents. This, we submit, is violence to clear language and law. It is impossible, says the Court (full paragraph, R. 137), for a lessee to be the owner of all the oil in place, and at the same time be under obligation to pay 1/20th royalty to the petitioner; and yet the result below is possible only if a lease by Respondents vest in the lessee 100% ownership of the oil in place notwithstanding it provides for royalty payments to Petitioner and Respondents. This 100% vesting could not be if "royalty" is ownership of part of the oil in place; such a lease would not be a disposal of "the whole of the oil, under within and upon said lands—or any part thereof," as required by Paragraph 6. The Court proves too much.

In this same paragraph is a holding that a vendee of all the oil is not a successor or assign of Respondents (R. 137). This holding, we submit, is violence to language and law. Also the Court mentions here only one sentence of Paragraph 9. There is not mentioned the explanatory "this obligation to deliver 1/20th of said oil shall be one running with the ownership of the well—" and following words. The owner of the well is the owner of the minerals in place—all the minerals in place and not part of them. This clause and the balance of deed Paragraph 9, are eviscerated, completing the process of destruction which frustrates the plain in-

tent of the parties and the clear application of Texas mineral law and canons of construction.

At this point we desire to challenge as erroneous a statement as to the record. It is recited that the stipulation provides "(2) that the appellee is entitled to 5% of all royalty provided in said lease; (3) that the controversy is limited to the question of whether the appellee is entitled, upon the execution of a lease, to 5% of all oil produced in addition to 5% of all royalty provided in such lease" (R. 133-4). This same "agreement" is adverted to later (R. 135), and seems to be important in the thought of the Court. These statements are not borne out by the stipulation, which is as printed in the margin of the opinion and set out above. This error of the Court gives a false starting point, we believe, for its entire argument; and it undoubtedly gives a false picture of the position of the parties. Respondents asserted alternative one of the stipulation. Petitioner asserted alternative two as its position, and then suggested that alternative three was a possibility.

Another error of the Circuit Court of Appeals is in fixing Petitioner's right as the right of a co-tenant owning 5% of the oil in place, and deriving its right to 5% of production from that status. It is true that the deed provides for co-tenancy; but the proposition that Petitioner's right to 5% of production flows from this relationship is not true. That right comes from Paragraph 9 at all stages. One co-tenant developing oil accounts to the non-participating co-tenant, not proportionately for the gross oil produced, but for his proportion less expenses of production. BURNHAM v. HARDY OIL COMPANY, 108 Tex. 555, 195 S.W. 1139. Hence the 5% of gross production which Petitioner is entitled to receive is by virtue of Paragraph 9, which confers the royalty right, and related provisions which, were they not present, would force Respondents to account, on development by

themselves, for 5% royalty under Paragraph 9 and for 5% net from production to Petitioner as co-tenant.

We are at a loss to understand why the Court computed royalty as it did, unless it manifests a general thought of the Court that the contract as we construe it gives to Petitioner too much. Such evaluations have no part in the construction of the agreement. This computation comes from Respondents' brief below. It is true that 1/8th royalty is quite customary; but on this land 1/6th royalty was obtained in one lease (R. 16-42 at 31; stipulation of correctness of copy, R. 44). This was divided by agreement, 7/60ths to Respondents and 3/60ths or 1/20th of the gross production to Petitioner, as we contend we are entitled to receive from any lessee. 1/10th royalty was prevalent prior to the execution of the 1902 deed (R. 83-97). The purpose of the computation of the Court is obscure; and we here challenge its relevancy.

One last feature of the Court's opinion we mention specifically. The Court holds that the provisions of Paragraph 7 giving the lessee the same rights and powers with respect to "said five per cent (570)" as he obtains with respect to 95% conflicts with Paragraph 9, under which Petitioner would be entitled to 5% of the oil produced (R. 136). This reasoning is to create rather than avoid ambiguity, with a resulting nullification of the intent of Paragraph 9, and the creation of more difficulties and ambiguities than are purported to be solved. "Said five per cent" is oil in place; the powers vested are solely as to oil in place. Paragraph 7 does mention purchasers, which the Court, we believe, correctly holds to be lessees among others. Paragraph 8 continues that "the aforesaid rights and powers—may be exercised not only by said grantor, its successors and assigns, but by its or their lessees, agent and workmen" and others by authority. This indicates that the rights and powers contemplated at this

portion of the agreement were such as may be exercised by workmen, agents, etc. Does this vest ownership of the oil in place in workmen? And thus likewise destroy Paragraph 9? In the grantor, with the same result? The answer is a negative. The key is the fact that what is referred to here is not title, not the incorporeal royalty right of Paragraph 9, but the right of ingress and egress, of felling timber, exploration, etc., the powers exercisable with respect to oil in place. With this, the only reasonable interpretation, all difficulties of the Court below vanish.

We believe that we have sufficiently illustrated that the decision below flows from misinterpretation and misapplication of the Texas law and of the intent of the parties under applicable rules of construction. We now proceed to show that under our theory, all the difficulties purportedly found by the Court below are non-existent, and that under our contention the results required by Texas law are achieved.

3. *Interpretation of Paragraph 9 in Connection With the Deed as a Whole.*

There are, relevant to our inquiry, three parts of this deed, essentially different and serving variant purposes. *First*, is the granting clause, followed by description of the land. *Second*, appear certain clauses of exception and reservation, being Paragraphs 1 to 8, inclusive. *Third*, there is a clause of covenant, Paragraph 9.

The parties definitely distinguished, as must we, between ownership of oil in place, and the right to receive oil upon production by virtue of a real covenant. This distinction is made in the conveyance as clearly as it has been made by authority before and since; and the distinction is important in arriving at the intent of the parties.

There is a grant of all the lands described "save and ex-

cept the reservations and exceptions therefrom hereinafter made" (R. 3).

Excepted or reserved are 95 per cent of the oil in place, and "the full and complete rights and powers following" (Par. 1). There follow by way of reservation and exception, so denominated, the powers set out in Paragraphs 2 to 8, inclusive. On sale of all the oil in place, grantors are required to pay or deliver to grantee 5 per cent of the purchase price obtained (Par. 6).

Thereafter, in Paragraph 9, follows a matter textually distinguished from, and in idea and legal classification wholly different from, everything that goes before, to-wit, an agreement, an agreement having nothing to do with ownership of oil in place except that it imposes upon the oil in place and the owner thereof, howsoever and to whomsoever such ownership may pass, a real covenant for the benefit of John Henry Kirby, his heirs and assigns. We reproduce it:

> "It is distinctly understood and agreed that said grantor, its successors, and assigns, shall deliver to the said John H. Kirby, his heirs, executors, administrators, and assigns, at any well bored, or sunk, in said lands, the one-twentieth part of all crude oil, produced, and saved from said well. If there is a pipe line connected with said well, the said one-twentieth shall be delivered in said pipe line to the credit of the party entitled thereto; if there is no pipe line connected with said well, then said party entitled, to said one-twentieth shall at his own proper cost and charge, provide the means for saving, receiving and storing, his said one-twentieth. This obligation to deliver one-twentieth of said Oil, shall be one running with the ownership of the Well and when said grantor or any person or persons succeeding to its interest dispose of any interest in any well, there shall no longer rest upon it or them any obligation to perform this covenant, but such obligation shall thereupon at-

tach to the person or persons succeeding to such interest."

Note the introduction of new thought by the phrase *It is distinctly understood and agreed—*. For eight paragraphs reservations and exceptions have been described and regulated; now, in sharp contrast, in both text and thought, we are in a new subject, the subject of a real covenant undertaken by the grantor and *to run with the ownership—*. Note the universality of the undertaking: It binds *Said grantor, its successors and assigns—*. None who succeed to this grantor's estate in the oil in place, by any form of conveyance, can ever escape it; no more all-inclusive description of all who could possibly succeed to ownership can be found.

Note also that three times it is stated that the obligation of any successor or assign of the grantor shall be to deliver to John Henry Kirby, his heirs and assigns *one-twentieth* of production. Language could not be clearer; and in result, whatever interpretation may be given to the various paragraphs dealing with the "exceptions" and "reservations," Kirby Lumber Corporation is entitled to the benefit of this real covenant for one-twentieth of all oil produced.

There is one feature of this Paragraph 9 which should be emphasized before turning from it. The obligation is always upon the person who owns the oil in place. A vendee of Texas Land and Cattle Company would owe this obligation directly to John Henry Kirby, his heirs or assigns. Anyone not owning the well, anyone not owning the oil in place, anyone who had sold the oil in place, would not owe the obligation to John Henry Kirby, his successors and assigns. *The obligation comes into operation after production, and upon the owner-producer; whereas the obligations in Paragraph 6 to pay one-twentieth of the purchase price obtained upon*

sale is upon the person who sells, and not upon the purchaser-producer.

Before passing from this particular Paragraph (9), we wish to devote momentary attention to the contention that there is repugnance between it as we construe it, and as it plainly reads, and Paragraph 6. Suppose there had been a reservation of all the oil in place, and the deed had contained the covenants of Paragraph 9; surely there would have been no repugnance. There was in fact a reservation of 95% of the oil in place and certain powers, with a provision for sharing of the proceeds of sale of all the oil in place, and these provisions were coupled with the covenants of Paragraph 9; with equal certainty there is no repugnance.

4. *The Nature of Rights in the 5% of the Oil in Place*

There is a reservation of 95 per cent of the oil in place. Stopping here, as the Court below seem to do in this connection, there would seem to be a conveyance of 5 per cent of the oil in place; and the grantor and the grantee would be tenants in common, owning 95 per cent and 5 per cent respectively of the oil in place. The parties to the instrument may have thought in such terms; but such a result is not legally sound, because the powers reserved to the grantor with respect to the 5 per cent of oil in place, not otherwise reserved, aggregate all powers of ownership of oil in place. The conveyance reserves and excepts both 95 per cent of the oil and certain powers. These powers, excepted and reserved to the grantor and denied to the grantee, include the following:

> Exclusive power to explore for and possess all of the oil in place (Par. 2).
>
> Exclusive power to sell all the oil in place (Par. 6).

Thus the Grantee could not himself exert any dominion

whatsoever over the oil in place, or dispose of it. He had no right to such oil in place, except that upon sale of all of the oil by the grantor, he had a right to receive from the seller "one-twentieth of the purchase price obtained." Thus the form of conveyance of 5 per cent of the oil in place was followed, the while the substance of such a conveyance was negated, and this for the one, and the only possible purpose, under the terms of the instrument, of assuring to the grantee 5 per cent of the "purchase price obtained" on a sale. Note, please, the safeguards thrown around the right of Kirby. The power was required to be exercised "in good faith" (Par. 6). Any such conveyance was required to "pass to the grantee or grantees the whole of the oil * * *." (Par. 6.) In other words, the grantor was to have the right to develop, yielding only the 5 per cent of the oil produced as provided by the subsequently appearing real covenant (Par. 9); but if the premises became valuable for oil and the grantor should find a market for all or a part of the oil in place, it was required on sale to sell all the 5 per cent and all the 95 per cent *in place*, and Kirby was to receive 5 per cent of the price received. The real covenant later appearing, to pay one-twentieth of the oil produced to Kirby and successors, was not to be affected by any such transaction. Its own terms made it binding on any purchaser in any such transaction. Clearly the parties to this conveyance assured to the grantee the right perpetually to receive 5 per cent of the oil produced, regardless of by whom produced and when, and also 5 per cent of any money made on trading in the oil in place.

5. *Meaning of the Term "Sale" as Used in Paragraph 6*

The question emerges, what constitutes a "sale" within the meaning of Paragraph 6. Any such sale must be a sale of "the whole of the oil" under the lands or any part thereof. Is an

oil lease containing provisions for royalties a sale within the meaning of this paragraph? The answer is simple, if a conveyance of all the oil in return for bonus and promise of royalty was regarded by the parties *as a sale of all the oil in place;* for it was expressly stipulated that

> "Any such conveyance so made shall pass to the grantee or grantees therein *the whole of the oil* * * *,"

and any conveyance which conveyed less than the entire 5 per cent and 95 per cent of the oil in place would not be within the reserved power.

We believe, with the respondents, that, within the intent of the parties, provision in an oil lease by them for royalty does not prevent such lease from constituting a sale of all the oil in place. We arrive at this conclusion in part from Paragraph 9, providing for an obligation, by way of real covenant and not by way of ownership by Kirby and successors of oil in place, an obligation imposed upon persons because they are the owners of all the minerals in place, to Kirby and successors who may not be the owners of any oil in place. The parties thought it perfectly consistent for an operator to be the owner of all the oil in place, and at the same time, indeed because of such ownership, to be burdened with a real covenant to pay 5 per cent of the oil produced to Kirby and successors, who would not own any of the oil in place. By the same token royalty obligations in a lease by respondents would be perfectly consistent with ownership by the lessee of all the minerals.

There are certain considerations which argue that Paragraph 6 does not contemplate a lease with reservation of royalties when it uses the term "sale," and which suggest that it contemplates only a sale by mineral deed that does not provide royalty payments to the grantors. If Paragraph 6

were not in the deed, the other terms of the deed would vest in the grantors the power to execute a lease empowering the lessee to produce all the oil. Thus Paragraph 8 classes Lessees with workmen and agents of grantor, its successors and assigns, as among those who may exercise the powers of exploration and development. There is no reason, quite apart from this express contemplation of lease, why the grantor, with power to explore for and produce all the oil, and to vest similar power in another, could not vest such power by instrument in the nature of lease. Further, the parties having used the term "sale" in Paragraph 6, and the word "lessee" in Paragraph 8, the question may logically be raised as to whether they meant to differentiate between sale and lease.

If the term "sale" means only a deed conveying all oil in place without provision for royalty, the obligations of Paragraph 9, whether mentioned or not in any such conveyance, would nevertheless follow through to the hands of the purchaser. He would be a successor or assign of Texas Land and Cattle Company. The real covenant would still bind the estate in his ownership; for Paragraph 9 so provides.

Likewise, if sale means only such a deed, leaving Texas Land and Cattle Company or successors no royalty interest, a lease could be executed by the respondents without accounting to petitioner for bonus, delay rentals or royalty reserved to themselves. In such case petitioner would be entitled only to 1/20th of the oil produced, under Paragraph 9.

We feel duty bound to call these considerations to the Court's attention, although despite them we are of the view that the term "sale" in Paragraph 6 includes the term "lease." One reason is the insistence of respondents that it does. Another is that, traditionally, a sale of minerals in place, has always been, generally, by "lease," and that in both legal and popular uses the terms, as applied to minerals in place, are used interchangeably. Also it is quite apparent that the

grantee, in the 1902 deed, obtained in the trade 1/20th of the oil produced by anyone, and additionally 5 per cent of any money made by dealing in the oil in place, as distinguished from operating to produce it. To achieve the latter purpose Paragraph 6 was written, the broader term "sale" being used, we believe, to include not only lease, in the sense of sale with royalty reservation, but also any sale that might be made without royalty reservation, so that, whatever kind of sale of the minerals in place the grantor might make, the grantee would be assured of 5 per cent of the proceeds.

6. *Meaning of the Phrase "Purchase Price Obtained Upon Said Sale" as Used in Paragraph 6*

What is meant by "purchase price obtained upon said sale," 1/20th of which must be "paid" or "delivered" to Kirby or successor upon a sale? It is obviously whatever is received for the conveyance of the oil in place by the grantor or successors. If the term "sale" does not mean "lease," the problem is simple. If it does mean "lease," the problem is more complicated. It would include "bonus" money paid for the execution of the lease. In popular speech, a royalty provision, together with covenants, are part of the "consideration" for a lease. See authorities cited above. Accordingly, a royalty is, or may be said to be, part of the "purchase price obtained upon said sale" unless the words "obtained upon said sale," are construed to limit the purchase price to that obtained at the time of the sale. They do not have to be so construed, but may be given a sense of anything obtained for the sale. As to delay rentals, under current lease forms they are not promises, and therefore not properly consideration for the lease. They are, rather, payments which the lessee has the option of making in lieu of drilling, drilling or payment having the effect of preventing the fee mineral estate from terminating upon a limitation.

These payments are susceptible of treatment as "purchase price obtained upon (in the sense payments arising out of) said sale."

Summarizing, construing the deed as we must, most strongly against the grantor, a lease is a sale, and the purchase price obtained upon said sale, 5 per cent of which must be yielded to petitioner, includes everything received by respondents arising out of the lease, including bonus, delay rental and royalty.

Conclusion

WHEREFORE, Petitioner prays as in the Conclusion to its Petition for Writ of Certiorari.

Respectfully submitted,

KIRBY LUMBER CORPORATION,
Petitioner

By Joyce Cox

JOYCE COX,
2828 Gulf Bldg., Houston 2, Texas

FILE COPY

No. [redacted]104

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1945

KIRBY LUMBER CORPORATION, *Petitioner*

VS.

DENMAN KOUNTZE, ET AL., *Respondents*

ARGUMENT IN REPLY TO THE PETITION FOR WRIT OF CERTIORARI OF THE KIRBY LUMBER CORPORATION

LOONEY AND CLARK,
EVERETT L. LOONEY,
R. DEAN MOORHEAD,
712 Brown Building,
Austin, Texas,
Attorneys for Respondents.

SUBJECT INDEX

INDEX OF AUTHORITIES

No. 1224

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1945

KIRBY LUMBER CORPORATION, *Petitioner*

vs.

DENMAN KOUNTZE, ET AL., *Respondents*

ARGUMENT IN REPLY TO THE PETITION FOR WRIT OF CERTIORARI OF THE KIRBY LUMBER CORPORATION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Preliminary Statement

As is shown by the record herein and by the statement of facts contained in the petition for writ of certiorari, this case merely involves the construction of a deed by which the predecessor in title of the Respondents conveyed certain Texas lands to the predecessor in title of the Petitioner. No statutes or con-

stitutional provisions either of the State of Texas or of the United States enter into a determination of the case, and the record is devoid of federal questions of any kind or character. Petitioner seeks to invoke the jurisdiction of this Honorable Court under Rule 38 (5b) by alleging that the Court below decided an important question of local law in a way probably in conflict with applicable local decisions. Since Petitioner's allegations in this respect are intertwined with, and are virtually identical to, its arguments with respect to the merits of the case, the questions pertaining to jurisdiction and to the merits of the case will be discussed herein without segregation. Each of the numbered subdivisions of the ensuing argument is in reply to that portion of Petitioner's brief which bears a corresponding number.

Argument

1.

Throughout its petition for writ of certiorari and supporting argument, Petitioner has made a somewhat labored attempt to convince this Honorable Court that the Court below "misconceived and misapplied the Texas law" and that the result of this case "would have been different in the State Court, had the cause been litigated there." (See, for example, pages 3-6, 9, 21-25 of the petition for writ of certiorari, hereinafter abbreviated "P".) Any accusation that the Circuit Court for the Fifth Circuit has misconceived or confused the principles of Texas

mineral law bears on its face the elements of implausibility, for throughout the development of the petroleum industry in Texas, and especially in connection with the mass of litigation relating to the East Texas oil fields, the Circuit Court for the Fifth Circuit has been called upon to interpret and to apply the oil and gas law of Texas, and the decisions in which it has performed this task are legion. Indeed, either as a matter of counting decisions or as a matter of weighing the contributions of such decisions to the growth of Texas mineral law, one can seriously contend that the Circuit Court is on a par with the Supreme Court of Texas, and certainly the present oil and gas law of Texas owes more to the Circuit Court than it does to any one of the eleven Texas Courts of Civil Appeals.

In the case at bar, the untenable bases of such an accusation are well revealed by considering the specific charges which Petitioner has levelled at the opinion of the Court below. Under the heading "Basic Principles of Texas Law Confused and Not Applied by the Circuit Court of Appeals," Petitioner cites and quotes from a host of Texas decisions (P. 14-21). All of these decisions except the last evidently were inserted in some kind of an attempt to show that the Court below misconstrued principles which relate to the oil and gas law of Texas, and the last decision evidently was cited in a similar attempt to show that the Court failed to apply the appropriate canon of construction to the deed in question.

The first group of cases cited by Petitioner stand for nothing more or less than the following proposi-

tions: (a) That Texas adheres to the doctrine of the ownership in place of oil and gas, rather than to the doctrine of capture which prevails in some jurisdictions. (b) That Texas recognizes a distinction between ownership of minerals in place and ownership of an incorporeal royalty interest. (c) That in Texas the usual mineral lease is construed as a sale of the minerals covered by the lease, and, thus, that such a lease commonly is treated as tantamount to an instrument of sale. (d) That in Texas the "purchase price" for a mineral lease includes, among other things, the delay rentals, bonuses and reserved royalties. Respondents challenge none of these principles and can only express their surprise that Petitioner deemed it necessary to consume so much space in expounding them. Such principles are the elemental bases of Texas mineral law; they are known and understood by everyone who has even a nodding acquaintance with the oil and gas law of Texas; and, whether expressed or unexpressed, such principles form the basic premises of the solution of any problem pertaining to Texas minerals. Far from being disregarded, "confused" or "not applied" by the Circuit Court of Appeals, such principles were at the very heart of that Court's decision in this case. Thus, in its opinion the Circuit Court recognized that the deed in question conveyed ownership of oil in place (Record, hereinafter abbreviated "R", 134-135); it recognized that as a result of such conveyance the grantor and the grantee became co-tenants of the oil in place (R. 134-135)—and even Petitioner admits that this is correct (P. 23); it recognized that in

Texas a mineral lease is tantamount to a sale of the minerals in place (R. 135); it recognized that the "purchase price" of a lease includes, *inter alia*, delay rentals, bonuses and reserved royalties (R. 135); and it recognized the existence of an incorporeal royalty interest or running covenant as something apart from ownership of minerals in place (R. 137). In other words, the Circuit Court of Appeals recognized and applied in this case each and every one of the basic principles expounded in those Texas decisions which form the bulk of Petitioner's argument herein. And, as will be more fully shown in the succeeding subdivision of this Argument, that Court's application of such principles was in full accord with other Texas decisions, and, indeed, was the only application of such principles which the Court could have made without departing from such decisions.

As stated above, Petitioner also contends that the Court below "confused and failed to apply" a canon of construction to the deed in question, and in this connection Petitioner quotes the recognized principle that when the provisions of a deed cannot be harmonized, the courts will adopt the construction which confers the largest estate upon the grantee. (P. 20-21.) To state that the Court below "confused" or disregarded this canon is to depart from facts which are plainly revealed in the record, for in its opinion the Court below recognized such a canon (R. 137-138), and, quite correctly, also recognized that in Texas this canon is held to be a tool of last resort which cannot be employed if a seeming ambiguity is capable of resolution by the use of other

principles. In addition to the quotation to this effect from a Texas authority which was cited by the Court below (R. 138), the following Texas decisions are also pertinent: *Cartwright v. Trueblood*, 90 Tex. 535, 39 S. W. 930; *Klein v. Humble Oil and Refining Co.*, 67 S. W. (2d) 911; *Gilbert v. Smith*, 49 S. W. (2d) 702; *Jones v. Bedford*, 56 S. W. (2d) 305; *Smith v. Schlittler*, 66 S. W. (2d) 305. These and similar decisions have been summarized as follows in the standard text-book on Texas oil and gas law:

"The rule of construction favoring the grantee is the last one the court should apply, and should not be resorted to so long as satisfactory results can be secured by the application of other rules of analysis and construction . . ." Thuss, Texas Oil & Gas (2nd Ed.), pp. 46-47.

In the case at bar, the Court below found that the language of the deed and the obvious intention of the parties as expressed therein negatived the existence of the ambiguity which Petitioner sought to raise, and, hence, that there was neither need nor authority for the application of the principle of construction favoring the grantee. (R. 137-138.) In light of the foregoing authorities, it is submitted that this decision was eminently correct and that Petitioner is in the somewhat anomalous position of saying that the Court below should have discarded all principles of construction save and except the only one which might have bolstered Petitioner's contentions.

Except for the decisions cited by Petitioner on pages 14-20 of its Argument with respect to the ele-

mentary principles concerning ownership of oil in place, the nature of a Texas mineral lease, etc., and except for the one case quoted on pages 20-21 with respect to the above-mentioned canon of construction, Petitioner sets forth no authority whatsoever in support of its contention that the decision of the Court below was "in conflict with applicable local decisions" and that the result of the case below was "different from what would have been the result in the State Courts." Not one decision cited by Petitioner deals with a mineral deed or a mineral reservation which is even remotely comparable to that contained in the deed in question. Certainly if "applicable local decisions" exist, and if the decision below might possibly be in conflict with them, this Honorable Court is entitled to know what such decisions are in order that it may exercise its judgment as to jurisdiction pursuant to Rule 38(5b) and may enter the proper judgment with respect to the merits of the case. Certainly, also, Petitioner has failed to demonstrate that any "applicable local decisions" are in conflict with the decision below, and in seeking a writ of certiorari from this Honorable Court, Petitioner has done nothing more than to state certain general principles—each of which was recognized and applied by the Court below—and to attempt to persuade this Court to make the mighty leap between such principles and a conclusion that this Court should assume jurisdiction of the instant case and should render a judgment different from that which was rendered below.

As Respondents shall demonstrate in the succeed-

ing subdivision of this Argument, there are Texas decisions which are "applicable" to the instant case —decisions which construe factual situations which are virtually identical to that presented in the case at bar, and decisions which establish conclusively the correctness of the judgment of the Circuit Court of Appeals.

2.

Under the heading "Analysis of the Circuit Court of Appeals' Opinion," Petitioner posits and discusses an alleged "contradiction in premises" in the opinion of the Court below—a "contradiction" which, like the straw-man of the logicians, is first erected and then destroyed by Petitioner. The non-existence of such a contradiction doubtless can best be perceived by ascertaining what the Circuit Court actually held and why it so held.

The portions of the deed in question which are here in controversy are reprinted on pages 6-9 of the Record, and may also be found on pages 131-132 thereof and on pages 10-12 of Petitioner's Argument in Support of its Petition for Certiorari. Consequently, the deed will not be re-copied herein, and references to the deed in this Argument will conform to the paragraph numbers employed in the above-mentioned printings of such deed.

As its first step in considering the deed, the Circuit Court held that it conveyed to the grantee (the predecessor in title of Petitioner) all of the surface estate in the property in question, together with ownership of 5% of the oil in place, and that the grantor

(the predecessor in title of Respondents) retained ownership of 95% of the oil in place. (R. 134-135.) Here was a clear recognition and application by the Circuit Court of the Texas "ownership in place" doctrine, and here, too, is a clear refutation of Petitioner's contention that the Court failed to apply such doctrine.

Because of the split ownership of the oil in place, the Court next announced that the grantor and the grantee stood in the position of co-tenants with respect to such oil—a holding which necessarily followed from *Way v. Venus*, 35 S. W. (2d) 467, and the other Texas authorities collated in 31 Texas Jurisprudence 555-556. (R. 134-135.)

Following this, the Court below called attention to Paragraph 6 of the deed whereby the grantor and its successors received the power to sell the "whole of the oil," and the Court correctly noted that the possession of this power was in addition to the grantor's powers and privileges as a co-tenant of such oil. (R. 135.)

The consequences which flow from a co-tenancy of minerals which is coupled with a power of sale are well defined by decisions of the Texas Courts, and the judgment herein by the Circuit Court is in full accord with such decisions. In the case of *Gill v. Bennett*, 59 S. W. (2d) 473 (error refused by Texas Supreme Court), Jones conveyed to Bennett an undivided 1/16 mineral interest in an undivided 80 acres in a section containing 640 acres, or an undivided 1/128 mineral interest in the section. Subsequently, Jones executed an oil and gas lease cover-

ing this section and reserving the usual 1/8 royalty. Bennett ratified the lease after its execution, and the controversy between the parties was as to whether Bennett was entitled to 1/128 of *all* of the oil and gas produced from the property, or whether he was entitled to only 1/128 of 1/8 or 1/1024 of the total production. In holding that Bennett was entitled to only 1/1024 of total production (i. e., 1/128 of the reserved royalty of 1/8), the Court said:

"If Bennett did ratify the oil and gas lease, it operated as effectively as if he had originally joined in the same and passed to Gill (the lessee) 7/8 of the oil and gas in the section subject to the terms and conditions of the lease.

"If there was such ratification, then Bennett is a participating royalty owner and entitled to 1/128 of the oil and gas royalty agreed to be paid by lessee (or 1/128 of 1/8).

"On the other hand, if there was no such ratification, then Bennett is non-participating in the royalty, but is entitled to 1/128 interest in all of the oil and gas produced from the whole section."

As can be seen from this quotation, the Court decided the case upon the question of whether or not Bennett could be said to have "participated" in the lease. If he did participate, he was entitled to only 1/128 of the 1/8 reserved royalty; if he did not, he was entitled to 1/128 of total production. In that case the Court found "participation" by ratification of the lease, and drew an analogy between such situation and a situation in which Bennett might have "participated" by joining in the lease originally.

Equally analogous is the case at bar. In this case, the Respondents own 95% of the oil in place and Petitioner owns 5%. However, in addition to their ownership of the oil in place, Respondents also possess the power to sell the "whole of the oil" (a power which, as will be shown below and as is admitted by Petitioner, includes the power to execute a mineral lease covering the whole of the oil). Consequently, whenever Respondenst exercise their power of sale by leasing the property, Petitioner necessarily "participates" in the lease and Petitioner's interest passes under such lease. Under the holding of Gill v. Bennett, this "participation" confers upon Petitioner the right to only 5% of the royalty reserved in the lease, rather than 5% of total production—a conclusion which accords squarely with the decision of the Circuit Court in this case.

Similar in facts and result is the case of *Theo Oil Co. v. Thomas, et al.*, 108 S. W. (2d) 555, cited with approval by Chief Justice Alexander in *Murphy v. Dilworth, et al.*, 151 S. W. (2d) 1004. In this case an undivided 1/24 mineral interest was conveyed to one Carter and was by him in turn assigned to the Theo Oil Company. Prior to the deed, the grantor had executed an oil and gas lease on this property, and again the question was whether the Theo Oil Company was entitled to 1/24 of all of the oil and gas produced or was entitled to only 1/24 of the 1/8 reserved royalty or 1/192 of the total royalty. In holding that the oil company was entitled to but 1/192 of the total royalty, the Court said:

"We are of the opinion that the deed conveyed to Theo W. Carter a 1/24 of the royalty, which is a 1/192. In the case of Gill v. Bennett (Tex. Civ. App.), 59 S. W. (2d) 473, a mineral deed was executed conveying an undivided 1/16 interest in an undivided 80 acres of a 640 acre tract. Thereafter a lease was executed, the grantee in such deed joined in the subsequent lease, or at least ratified the lease. He made the contention that he was entitled to a 1/128 of the minerals in the whole 640 acre tract. He was decreed 1/1024 interest in the royalty of the whole tract. Writ of error was refused in this case.

"We can see no difference in a conveyance of an undivided 1/24 interest in the minerals in place out of a tract of land upon which there is an outstanding oil and gas lease, and the holder of a 1/24 undivided interest of the minerals in place who thereafter joins in the execution of an oil and gas lease. In either event as to the royalty he would be entitled to receive a 1/24 of the 1/8 royalty and not a 1/24 of the entire mineral production, in the absence of a reservation of such royalty."

In the case of *Murphy v. Dilworth, et al.*, 151 S. W. (2d) 1004 (Texas Supreme Court), the grantors in a deed reserved "an undivided one-sixteenth interest and estate in and to all of the minerals of every character, including oil and gas, in, under and appertenant to all of the above described property" for a period of fifteen years. The usual lease was then in effect with respect to this property. The trial court and the Court of Civil Appeals held this reservation to be ambiguous, and, upon the introduction of parol evidence, held that the reservation was of 1/16 of all of the royalty, or 1/2 of the 1/8 royalty reserved in the

lease in effect at the date of the deed. In reversing the decisions of these courts, the Supreme Court, speaking through Chief Justice Alexander, held that the reservation was unambiguous and that, properly construed, it entitled the grantors to only 1/16 of the reserved 1/8 royalty. In so holding, the Court observed that:

"The reservation contained in the deed appears on its face to be plain and unambiguous. In clear language it reserves an undivided 1/16 interest in the minerals in and under said land, and makes no reference whatsoever to any royalty to be paid under any existing or subsequent lease."

Similarly, in the deed involved in this cause, nothing can be found to show that Petitioner possesses anything other than a 5% undivided mineral interest. Petitioner holds everything which Respondents' predecessor in title did not reserve, and since such predecessor plainly reserved a 95% undivided mineral interest, it necessarily follows that Petitioner holds only a 5% undivided interest. Indeed, the facts in the instant case are even stronger than those in Murphy v. Dilworth, for in addition to the absence of language indicating that Petitioner holds other than a 5% undivided interest, there is the affirmative statement in Paragraph 6 of the deed that upon a sale of the whole of the oil in place (which sale, as will be shown, includes a mineral lease), Petitioner shall be entitled to but 5% of the consideration received.

In the case of *Starling v. Preston, et ux.*, 155 S. W. (2d) 1009 (error dismissed) one Lovett conveyed to

Preston 1/16 of the oil and gas in certain property, retaining 15/16. Subsequently, Lovett's interest became vested in a trustee who executed a lease which conveyed the oil and gas in the property. Although Preston did not join in this lease, and although the trustee had no power to lease Preston's interest, Preston subsequently made a settlement with the lessee and confirmed the lease. In holding that Preston was entitled to only 1/16 of the 1/8 royalty under this lease, rather than 1/16 of the total production, the Court stated:

"The deed from Lovett to Preston was correctly construed as vesting in Preston a full 1/16 of all the oil and gas minerals in and under the land. The remaining 15/16 was retained in Lovett, which by mesne conveyance from and under Lovett became vested in the trustee. If Preston and the trustees had then joined in a lease conveying the 7/8 leasehold interest covering the land, clearly they would have owned the remaining 1/8 royalty interest in like proportions as they originally owned all the minerals, that is to say, that Preston would have owned a 1/16 of the 1/8 royalty interest and the trustee 15/16 of the 1/8 royalty. Preston did not join the trustee in the original execution of the lease conveying to the Arkansas-Louisiana Gas Company the 7/8 leasehold interest covering the land. So at the time he filed his suit against the trustee and the Arkansas-Louisiana Gas Company, Preston was entitled to recover of said defendants his full 1/16 interest in and to all the minerals in said land. But plaintiffs and intervener compromised and settled with the Arkansas-Louisiana Gas Company as to the 7/8 leasehold interest, which amounted to a ratification and confirmation of the lease and its legal effect was equivalent to

joining in its original execution. Therefore, at the time plaintiffs and intervener went to trial against the trustee they were entitled to recover 1/16 of the 1/8 royalty interest, and not 1/2 of the 1/8 royalty interest as was the effect of the judgment rendered."

Here again the facts in the instant case are indistinguishable in effect. Under the terms of the deed in question, and through mesne conveyances, Respondents own an undivided 95% interest in the oil, and Petitioner possesses an undivided 5%. If both were to join in the execution of an oil lease, in the words of the Court "clearly they would . . . own . . . the remaining 1/8 royalty interest (reserved in the lease) in like proportions as they originally owned all the minerals," that is to say, Respondents would own 95% of the 1/8 royalty, and Petitioner would own the remaining 5% of the 1/8 royalty. Moreover, since Respondents possess the power to lease the land without joinder of Petitioner, and since any such lease passes a proportionate part of Petitioner's interest as well as that of Respondents, the effect is the same as if Petitioner had joined in such lease, or subsequently ratified it, and the respective shares of Respondents and Petitioner would remain the same as last set forth above. Again, this result is in full accord with that reached by the Circuit Court.

In the recent case of *Richardson v. Hart*, 185 S. W. (2d) 563, the grantors conveyed "an undivided 1/16 of 1/8 interest in and to all of the oil, gas and other minerals" on certain lands, such lands being then subject to an oil and gas lease, and the conveyance being made subject to this lease, but covering

and including "1/16th of 1/8th of all of the oil royalty, and gas rental of royalty due and to be paid under the terms of said lease." In the trial court and in the Court of Civil Appeals, this conveyance was held to vest in the grantee 1/16 of 1/8 of all of the royalty, or 1/128. In reversing these decisions and in holding that the grantee was entitled to but 1/ 16 of 1/8 of the 1/8 reserved royalty, or 1/1024 of the total royalty, the Supreme Court observed:

"Without any stipulation as to royalties the interest thus conveyed would carry with it *by operation of law* the right to 1/128 of the royalties paid under any lease (or 1/1024 of the total royalties). However, the parties did not leave the matter of the payment of royalties under the existing lease to be determined *by operation of law.* In the third paragraph of the deed they made a covenant in regard thereto which passed to the grantee the second estate above mentioned. The fact that it fixes the share in the present royalties the same as would have obtained by operation of law does not lessen its force and effect as a conveyance. (Explanatory figures in parentheses added, together with italics.)

Thus, here again we find a recognition by the Supreme Court that a co-tenancy in a mineral estate in Texas carries with it "by operation of law" only the right to a proportionate part of the royalties paid under a lease, rather than the right to a proportionate part of total production. Moreover, it is interesting to note that in the instant case, as in Richardson v. Hart, the parties to the conveyance expressly set forth therein the proportions which they were to

receive—as was done by the provision of Paragraph 6 of the deed in question which provided that 5% of the purchase price upon sale should go to the grantee—and that, in the words of the Supreme Court, the fact that such provision "fixes the share in the present royalties the same as would have obtained by operation of law does not lessen its force and effect as a conveyance."

In the case of *Watkins, et ux. v. Slaughter, et al.*, 183 S. W. (2d) 474, the grantor reserved a "1/16 interest in and to all of the oil, gas and other minerals in and under and that may be produced from said land," providing, however, that he should receive no part of the money rental or bonus paid on any future lease, conferring upon the grantee the power to lease such land, and stating that in such event the grantor "shall receive the royalty retained herein only from actual production of oil, gas or other minerals on said land." Subsequently, the grantee leased the land, and the usual controversy arose as to whether the grantor was entitled to 1/16 of the total royalty, or 1/16 of the ⅛ royalty reserved in the lease. The trial court held that the grantor was entitled to 1/16 of the total royalty. In examining this question, the Court of Civil Appeals correlated the authorities and stated the problem before it as follows:

"Applying the law, as thus expressed, to the instant case, if the reservation contained in the deed from Bob Slaughter of 1/16 interest in and to all of the oil, gas, and other minerals in and under and that may be produced from the tract of land conveyed was

royalty as distinguished from a mere undivided 1/16 interest in all of the oil, gas, and other minerals, the judgment of the court below was correct and should be affirmed. *If, however, the effect of the reservation was merely to reserve an undivided 1/16 interest in the oil, gas, and other minerals and give to the grantee Watkins authority to lease the land on behalf of the grantor as well as himself, it follows that the interest owned by the appellees was combined with that owned by the appellants and was conveyed to the lessees by the oil and gas lease in the same manner and with the same proportionate reservation of royalty. In that event the interest of the appellees would be only 1/16 of such reservation, which was 1/8 of the oil and gas produced and would be only 1/128 of all of the oil and gas produced.* Murphy v. Dilworth, 137 Tex. 32, 151 S. W. (2d) 1004; Theo Oil Co. v. Thomas, Tex. Civ. App. 108 S. W. (2d) 255; McGill v. Bennett, Tex. Civ. App., 59 S. W. (2d) 473." (Italics added.)

It is patent that the alternatives posed by the Texas Court in the above quotation are an accurate summary of the cases therein and herein cited, and that the latter alternative stated by the Court is an apt description of the case at bar. If, says the Court, the interests are undivided interests, and if one of these interests is coupled with a power to lease, then upon the execution of such lease the interests of both co-tenants pass to the lessee, and each co-tenant is entitled to only his proportionate part of the royalty. Every facet of the present case is covered by this description. Respondent and Petitioner possess undivided interests in the oil in the respective proportions of 95% and 5%, with Respondents possessing

the power to lease the whole of such oil. When and if Respondents exercise such power, the interests of both Respondents and of Petitioner pass to the lessee, and Respondents and Petitioner are entitled to the reserved royalty in the proportions of 95% and 5%.

These rulings by the appellate courts of Texas state with clarity and with precision the respective rights of co-owners of undivided mineral interests which are leased by one of such owners, and every aspect of these decisions supports the judgment of the Circuit Court herein.

In view of such decisions, it is difficult to see how Petitioner can contend that the judgment of the Circuit Court is in conflict with "applicable local decisions" or that the judgment of that Court is "different from what would have been the result in the State Courts." Such a contention is especially difficult to understand when one recalls that Petitioner has cited not one single case which deals with a mineral deed or mineral reservation comparable to those presented in the instant case, and when one perceives that the foregoing Texas cases conclusively lead to the decision of the Circuit Court that Petitioner is entitled to but 5% of the reserved royalty in any lease which is executed in connection with the oil in question, plus 5% of whatever other consideration is received.

After holding that Respondents and Petitioner are co-tenants of the oil which is involved in this suit, and that by virtue of Paragraph 6 of the deed, Respondents possess the power to sell the whole of such oil, provided Petitioner is given 5% of the "purchase price" received upon such sale, the Circuit Court con-

cluded its chain of reasoning by applying principles which are well established in Texas and which are not the subject of dispute by the parties herein. Thus, said the Court, in Texas the power to sell minerals is tantamount to and includes the power to lease such minerals (R. 135). This has long been the settled law of Texas, see 31 Texas Jurisprudence 574-577 and cases cited therein, and the parties to this cause have stipulated that Respondents' power of sale confers upon them the power to execute a mineral lease (R. 44, 133). Following this, the only question remaining before the Circuit Court was to ascertain what constitutes the "purchase price" of any lease which Respondent might execute, and to assign to Petitioner its 5% of such "purchase price." Here again, the question was decided for the Court by settled principles of Texas law. Thus, in *Sheppard v. Standolind Oil & Gas Company*, 125 S. W. (2d) 643 (error refused by Texas Supreme Court), the Court stated:

"Royalty also is on the same footing as bonus, cash, deferred or oil, as regards representing a part of the purchase price for the lease. . . . Consequently anything which the lessor receives, in whatever form, in consideration for the oil taken or to be taken from the land, constitutes a part of the purchase price of the title to the oil, and therefore of the land. State v. Hatcher, 115 Tex. 332, 281 S. W. 192; Andrews v. Brown, Tex. Civ. App. 283 S. W. 288."

Hence, the Circuit Court necessarily held that the "purchase price" for the execution of any lease by Respondents "includes, in addition to any bonus and

delay rentals, the agreed royalty" (R. 135), and the Circuit Court necessarily decided the point at issue in this suit by holding that upon the execution of any such lease, the Petitioner is entitled to 5% of the delay rentals, of the bonus, and of the agreed royalty.

Again, Respondents wish to reiterate that there is no "confusion" or disregarding of "applicable local decisions" in this chain of reasoning and in the decision reached by the Circuit Court. To the contrary, such reasoning stems directly from the very principles which Petitioner claims were disregarded by the Court below, and such principles point squarely to the correctness of the judgment reached by the Cirsuit Court.

3 and 4.

In subdivisions 3 and 4 of its Argument, Petitioner considers the effect of Paragraph 9 of the deed in question, and Petitioner renews its contention that this Paragraph confers upon it a 5% interest in the oil in question which is over and above the 5% interest which it has received elsewhere in the deed. In summary, Petitioner contends that upon the execution of a mineral lease by Respondents, Petitioner should receive its 5% of the agreed royalty, bonus and delay rentals under Paragraph 6 of the deed, and, in addition, that it should receive an extra 5% royalty by virtue of the provisions of Paragraph 9.

This contention was considered and was expressly rejected by the Circuit Court. (R. 135-138.) Throughout its petition for certiorari and supporting argument, Petitioner has sought to create the

impression that the Court's treatment of Paragraph 9 resulted from its failure to discern the distinction between ownership in place and an incorporeal royalty interest. Thus, after stating such distinction, Petitioner avers "The Circuit Court of Appeals has failed to comprehend and apply these fundamentals and distinctions. To it there is no distinction between incorporeal royalty interest and ownership of oil in place, consequently, the key to the proper construction of the deed is lost." (P. 5.)

Far from failing to comprehend and to apply this distinction, the Circuit Court exhibited in its opinion herein a full appreciation and utilization of such distinction. Thus, the Court explicitly stated that the granting clause of the deed creates a co-tenancy based upon ownership in place (R. 134), and, in addition, the Court recognized that Paragraph 9 of the deed creates a royalty interest—a "running covenant," to employ the language of the Court. (R. 137.) Petitioner's real complaint arises, not from the fact that the Circuit Court failed to recognize Paragraph 9 as creating a royalty interest, but rather from the fact that the Circuit Court correctly defined and delineated the circumstances under which such royalty interest is effective.

Thus, the Court held—contrary to Petitioner's contention—that Paragraphs 6 and 9 of the deed obviously could not have been intended to apply to the same factual situation. Under Paragraph 6, Respondents are privileged to sell (or lease) the "whole" of the oil; under the same Paragraph, the purchaser (or lessee) is to obtain the "whole" of the oil; and under Paragraph 7, such purchaser's (or

lessee's) rights and powers with respect to the 5% of the oil in place are to be the same as those with respect to the 95% of the oil in place. The Circuit Court rightly discerned that there is a sharp conflict and incongruity between Paragraphs 6 and 9 if they are construed as being applicable to the same situation, and the Court rightly obviated such inconsistency by assigning to each Paragraph its proper sphere of operation. The Circuit Court succinctly stated its conclusions in this respect as follows (substituting "Respondents" for "Appellants" and "Petitioner" for "Appellee"):

"If the Respondents decide to lease 100% of the oil in place under the power given in paragraph six, paragraphs six and seven are operative, but paragraph nine by construction is inoperative. If Respondents choose to develop the land themselves—as apparently was within the contemplation of the parties to the deed by virtue of paragraphs two to five, inclusive, thereof—paragraph nine entitles the Petitioner to a 5% share of any oil which may be produced. Obviously, paragraphs six and seven would have no application. Likewise, if the appellants choose to sell not the whole (100%) of the oil under paragraph six, but only their undivided 95% interest in the oil in place, the person who succeeds to such share and stands in their shoes as co-tenant also is bound to pay to the Petitioner 5% of all production." (R. 136-137.)

In these words is found a complete refutation of Petitioner's contention that the opinion of the Circuit Court is grounded upon a "contradiction of premises." As viewed through the lenses of Petitioner,

this contradiction results from an alleged belief on the part of the Court that ownership in place and ownership of royalty interest cannot co-exist in the same situation (Pp. 5-6, 21). However, when the language and ruling of the Court are placed in evidence against such allegation, it is patent that the only existent contradiction is that which is present in Petitioner's viewpoint. Plainly, from the language of the Court's opinion as contained on pages 130-139 of the Record, the Circuit Court did not hold that ownership in place and ownership of a royalty interest may not co-exist; neither did it fail to discern the difference between these two concepts. Rather the Court said that the very language of the deed in question negatives the co-existence of these two interests in the same situation, since a purchaser or lessee under the provisions of Paragraph 6 would not obtain the "whole of the oil" and would not obtain the same rights with respect to the 5% as he obtains with respect to the 95% if what he obtains is burdened with the obligation to make an additional 5% royalty payment under Paragraph 9. Moreover, the Circuit Court carefully perceived that the very wording of Paragraph 9 precludes its application to any situation in which a sale or lease is made under Paragraph 6. The Court's keen analysis of this Paragraph is concisely set forth on page 137 of the Record, and in the interests of brevity, Respondents will not repeat such analysis herein. A reading of this analysis, together with those other portions of the Court's opinion which bear upon Paragraph 9, will conclusively show that the Circuit Court did not purport to make any far-

sweeping or general pronouncement with respect to the incompatibility of ownership in place and of royalty interests. Rather, the Circuit Court merely held that under the particular language of this particular deed, the royalty interest contained in Paragraph 9 could not be operative in a situation in which ownership in place was transferred under the provisions of Paragraph 6.

The extent to which the opinion of the Circuit Court necessarily is based upon, and is confined to, the particular language in this particular deed highlights another erroneous impression which might be gleaned from a reading of the petition for certiorari herein. Petitioner would have this Court believe that the opinion below is of earth-shaking importance—that "there are at issue in this cause generally important questions arising under the mineral laws of the State of Texas" (P. 2); and that the great petroleum industry of the State of Texas might be affected by the decision in this cause. (P. 6.) As a matter of plain cold truth, this case involves only the construction of one particular written instrument—an instrument which was executed nearly a half century ago and an instrument whose provisions are so unique and so out of line with standard instruments of its character that it is doubtful if their counterparts exist. Regardless of the way in which this case is eventually decided, it may well be questioned if another similar case will ever arise or if the decision will ever be cited as precedent in a subsequent suit. The case is, of course, of extreme importance to the parties herein, and all parties are highly interested in obtaining a correct adjudication of its

issues, but any suggestion that the suit possesses any significance beyond its importance to the immediate parties is, to say the least, incongruous.

5 and 6.

In subdivisions 5 and 6 of its Argument, Petitioner sets forth somewhat Socratic discussions of the meaning of the terms "sale" and "purchase price" as used in the deed in question. Respondents confess that they are unable to perceive the relevance of such discussions to any disputed point which is presented by the record in this case, but if the discussions have some relevance, Respondents are happy to be able to admit that they agree with virtually every statement contained in such discussions—and doubtless the Circuit Court would also make such an admission since portions of its opinion and of these discussions paraphrase each other.

In subdivision 5, Petitioner muses upon the question of whether or not the power of sale which is contained in Paragraph 6 of the deed includes the power to execute a mineral lease. Interesting as this discussion might be, its importance at this stage of this case is perhaps minimized by the fact that Petitioner stipulated long ago that the power of sale did include the power to lease (R. 43-44, 133), by the fact that the courts of Texas have consistently so held, see 31 Texas Jurisprudence 574-577, and by the fact that Petitioner concludes that "the term 'sale' in Paragraph 6 includes the term 'lease' "—a conclusion which is also shared by Respondents and by the Circuit Court of Appeals (R. 135, 138).

In subdivision 6, Petitioner discusses the meaning of "purchase price" and arrives at the conclusion that, for the purposes of this case, such term includes delay rentals, bonuses and agreed royalties—a conclusion which necessarily follows from the Texas decisions cited by Petitioner on pages 14-20 of its Argument, a conclusion with which Respondents are in accord, and the very conclusion which the Circuit Court recognized (R. 135) in deciding the basic issue in this case—that Petitioner is entitled to only 5% of the delay rentals, bonuses and agreed royalty when the lands in question are leased.

Conclusion

In presenting this Argument in reply to the petition for writ of certiorari, Respondents have attempted to consider the opinion of the Circuit Court of Appeals in light of Petitioner's criticisms of such opinion. Doubtless this has been a task of supererogation, for the opinion of that Court requires no defense. Succinctly and without overlooking a single issue in the case, the Circuit Court has written an opinion herein which stems from basic principles of mineral law and which follows inescapably to the conclusion which is now before this Honorable Court. Respondents submit that this Honorable Court should extend its approval and lend its encouragement to opinions of this character by permitting such opinion to stand as the ultimate decision of this cause.

WHEREFORE, Respondents pray that this Honorable Court deny the petition for writ of certiorari

herein, or, in the alternative, that this Honorable Court affirm the judgment of the Circuit Court of Appeals.

Respectfully submitted,

LOONEY AND CLARK,

Everett L. Looney

EVERETT L. LOONEY,

R. Dean Moorhead

R. DEAN MOORHEAD,

712 Brown Building,
Austin, Texas,

Attorneys for Respondents.